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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-196

ELWOOD HAMMOCK,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

****

PETITION FOR WRIT OF CERTIORARI

****

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The petitioner, Elwood Hammock, prays that a writ of certiorari issue to review the judgment made by the North Carolina Court of Appeals, entered March 17, 1975, affirming the decision of the Superior Court Division, General Court of Justice of Brunswick County, North Carolina, denying the petitioner's motion for a new trial on the basis of newly discovered evidence, which judgment the Supreme Court of North Carolina refused to review on May 6, 1975, when it denied his petition for writ of certiorari.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals, 25 N.C. App. 97, 312 S.E.2d 180 (1975) is appended to this petition. The judgment of the Supreme Court of North Carolina denying petitioner's petition for certiorari, ____ N.C. ____, 214 S.E.2d 435 (1975) is also appended to this petition.

JURISDICTION

The judgment of the Superior Court of Brunswick County denying petitioner's motion for new trial on the basis of newly discovered evidence was made and entered September 17, 1974. Petitioner's relief in the North Carolina Courts was exhausted when his conviction was affirmed by the North Carolina Court of Appeals and when on May 6, 1975 the Supreme Court of North Carolina denied his petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

I. Whether the petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution when the Superior Court of Brunswick County denied petitioner's motion for a

new trial, said motion having been made on the basis of newly discovered evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statute 14-34.2:

> Any person who shall commit an assault with a firearm upon any law enforcement officer or fireman while such officer or fireman is in the performance of his duties shall be guilty of a felony and shall be fined or imprisoned

for a term not to exceed five years in the discretion of the Court.

STATEMENT OF THE CASE

Petitioner was tried and convicted of the crime of assault upon a law enforcement officer in violation of N.C. G.S. §14-34.2 and was sentenced to be imprisoned for a term of not less than two years nor more than five years. Petitioner appealed this conviction through the North Carolina Courts until his final appeal was dismissed and his petition for certiorari was denied by the Supreme Court of North Carolina. Prior to this final dismissal of his appeal and denial of his petition for certiorari to the North Carolina Supreme Court the petitioner filed a "Motion for New Trial on the Basis of Newly Discovered Evidence" in the Superior Court of Brunswick County.

During the September 9, 1974 Superior Court Session a hearing was held on petitioner's motion for a new trial. At this hearing the petitioner presented evidence which consisted of the testimony of two witnesses and the record of petitioner's original trial. The record of petitioner's original trial showed that the principal defense relied upon by the petitioner was that he lacked the mental capacity on the date of the incident to know the nature and quality of his actions

and the fact that his actions were wrong. Petitioner's affirmative defense of insanity was based upon the testimony of a doctor from the State mental institution at Cherry Hospital who had examined the petitioner, a local physician who had examined the petitioner and the testimony of the petitioner's wife. The two physicians offered testimony concerning the petitioner's physical and mental condition and the medication which had been prescribed for the petitioner, including potential side effects of that medication. The petitioner had just been released from the mental institution at Cherry Hospital and in fact was at home on a trial basis at the time of this incident. However, neither of the two physicians were able to give an opinion as to whether the petitioner knew the difference between right or wrong on the date of the incident, since neither of them had seen the petitioner on that date. The doctors did testify that a potential side effect of the petitioner's medication was to cause a state of confusion in the petitioner. Petitioner's wife testified that based upon her observations of the petitioner it was her opinion that he did not know the difference between right and wrong on the date of the alleged assault.

At the hearing on petitioner's motion for a new trial Richard W. Edwards testified that he was the officer that had originally arrested the petitioner and who allegedly had been assaulted. He testified that he was no longer employed by the Brunswick County Sheriff's Department but that he was presently employed by the Drug Enforcement Administration of the Federal Government. He testified that on the date the petitioner allegedly assaulted him with a shotgun, he was serving a capias on the petitioner. He testified that prior to that occasion he had seen the petitioner only one other time when he had partially fingerprinted the petitioner. Other than that contact he had only heard about the petitioner through rumors and he did not really know the petitioner.

Mr. Edwards testified that when he went to serve the capias on the petitioner the petitioner informed him that he had a doctor's excuse for his absence from court which he had sent to Judge Giles Clark with a friend. Mr. Edwards then contacted the Court to see if he did have such an excuse, and the Court informed him that they had seen the excuse but that Judge Clark had denied that particular doctor's excuse and the petitioner was to be brought to Court. When Mr. Edwards went back and

informed the petitioner that his excuse has been denied, the petitioner picked up a shotgun and pointed it towards Officer Edwards. The petitioner's wife stepped between them and Officer Edwards left to get help in making the arrest of the petitioner. Officer Edwards testified at this time the defendant was "all excited and nervous and aggitated and kind of wild-eyed."

Officer Edwards then testified that subsequent to the arrest and the trial of the petitioner, that he, Richard W. Edwards, had gotten to know the petitioner. He saw the petitioner on the street a few times and talked with him and also worked with him. The petitioner gave him certain information that led to drug arrests. Also, Mr. Edwards had been stationed by the Sheriff outside the residence of the petitioner to carry out surveillance of the petitioner's residence. He spent approximately 240 hours in surveillance over a period of about a month and a half. He also participated in three different raids on the petitioner's house. However, during all of this surveillance and the raids on the petitioner's house they did not see any evidence of drug trafficking by the petitioner. In addition, Mr. Edwards had occasion to speak with the petitioner on several other occasions following the petitioner's trial.

Mr. Edwards testified that since the time of petitioner's trial he felt that he had come to know the petitioner fairly well as a result of the above contacts. Mr. Edwards stated that he had an opinion as to whether the petitioner knew what he was doing or knew the difference between right and wrong at the time of the alleged criminal act. His opinion was that he was now convinced that the petitioner was "messed up" on that day and that the petitioner did not know the nature and quality of his acts at the time that he pointed the gun at Officer Edwards. Mr. Edwards further testified that he did not have this opinion at the time of the trial and that he based his opinion on his contacts with the petitioner subsequent to the petitioner's trial. At the original trial when Mr. Edwards was asked whether the petitioner appeared to be normal as far as his actions, Mr. Edwards replied: "Well, I don't know him as normal or abnormal, so I don't know if I can answer that question." At this hearing Mr. Edwards testified that when he was asked at the original trial whether he thought the petitioner was normal or abnormal, he stated that he could not answer that question because he did not know what was normal for the petitioner, but that since the time of trial, he had seen the petitioner when he was "straight" and the petitioner

is a completely different person in those circumstances. Mr. Edwards testified that basically what he was testifying to was that he had seen the petitioner "straight" and that the petitioner was not that way on the day the gun incident occurred.

Mr. Edwards further testified on cross-examination that he had not received any offers or rewards to testify on the petitioner's behalf, but that he had received threatening phone calls telling him not to testify on the petitioner's behalf.

At the hearing on his motion for a new trial the petitioner also offered the testimony of Henry G. Foy, who was one of the attorneys who represented the petitioner at his original trial. Mr. Foy testified that he questioned Officer Edwards in a general way to get a feeling of how Officer Edwards felt on the question of whether the petitioner knew the difference between right and wrong on the date of the alleged assault. After talking with Officer Edwards he decided it would not be in the petitioner's best interest to elicit an answer from Officer Edwards on this question. Therefore, they did not ask Mr. Edwards whether the defendant knew right from wrong at the time of his alleged assault.

At the original trial on the assault charge, however, they did ask Mr. Edwards whether the petitioner appeared to be normal in his actions and Mr. Edwards responded "Well, I don't know him as normal or abnormal, so I don't know if I can answer that question." Therefore, they did not ask Mr. Edwards any further questions about the petitioner's state of mind on the date of the alleged assault.

The State offered no evidence during the hearing on defendant's motion for a new trial. Following the hearing on this matter, Superior Court Judge Harry E. Canaday, who had presided at the hearing, entered an order on September 17, 1974 denying the petitioner's motion for a new trial based on newly discovered evidence.

ARGUMENT

The decision below should be reviewed because the North Carolina Court of Appeals decided a federal question of substantial importance in such a way that the petitioner's right to due process of law has been abridged.

The issue raised in this petition for certiorari is whether the petitioner was denied due process of law when his motion for a new trial on the basis of newly discovered evidence was denied, the newly discovered evidence being the testimony of the prosecuting witness that he now believed the petitioner did not know the difference between right and wrong at the time of the alleged criminal act and did not know the nature and quality of his act at that time.

1. The petitioner's right to due process of law was abridged when his motion for a new trial, based on newly discovered evidence, was denied.

The Superior Court of Brunswick County in its order dated September 17, 1974 denied the petitioner's motion for a new trial. It held that the testimony of Richard W. Edwards showing that he was of the opinion that the defendant did not know what he was doing when he pointed the gun at Mr. Edwards did not

constitute newly discovered evidence; that if the conclusion and opinion now held by Richard W. Edwards did constitute newly discovered evidence, such evidence was merely cumulative of the testimony of the witness Bessie Hammock; and that it was not probable that a different result would be reached if the defendant was granted a new trial on the basis of this newly discovered evidence.

The North Carolina Court of Appeals affirmed the decision of the Superior Court of Brunswick County without any real discussion of the legal merits of petitioner's claim, holding only that there was no abuse of discretion by the Superior Court in denying petitioner's motion for a new trial. State v. Hammock, 25 N.C. App. 97, 212 S.E.2d 180, 182 (1975). The North Carolina Supreme Court then denied petitioner's petition for a writ of certiorari to review the decision of the North Carolina Court of Appeals. State v. Hammock, _____ N.C. _____, 214 S.E. 2d 435 (1975).

At the present time, Richard W. Edwards, the State's primary witness at the trial of this action, has come forward and testified that he has formed an opinion that the petitioner did not know right from wrong on the date of

the alleged offense, May 16, 1973. Petitioner respectfully contends that to deny him a new trial in the face of such evidence is a denial of due process of law.

On the initial trial of this case, Mr. Edwards did not have an opinion as to whether the petitioner knew right from wrong on May 16, 1973. The law in North Carolina is that:

> Anybody who has observed another or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although that witness is not a psychiatrist or expert in mental disorders. In Re Brown, 203 N.C. 347, 166 S.E. 72 (1972) (emphasis added).

To be admissible in North Carolina this non-expert opinion must be based upon observation of the defendant by the witness and the value of the witness's opinion is dependent upon the opportunity of the witness to form it. In Re Knowles, 11 N.C. App. 155, 180 S.E.2d

394 (1971). In the instant case Mr. Edwards had no opportunity to form an opinion as to the petitioner's sanity prior to the trial of this matter. Mr. Edwards observed the petitioner on only two occasions prior to the trial. Without other observation Mr. Edwards was not qualified under North Carolina law to give his opinion as to the petitioner's mental condition on May 16, 1973. Mr. Edwards became qualified to give such testimony only following the trial of this action when he came in contact with the petitioner and came to know the petitioner. It was these later observations of the petitioner by Mr. Edwards which qualified Mr. Edwards to give his opinion that the defendant did not know right from wrong on May 16, 1973. The evidence submitted by the defendant is thus clearly "newly discovered." It is evidence which was not available to the petitioner at the trial of this action and became available to the petitioner only following the trial when Mr. Edwards came forward on or about May 22, 1974 and divulged to petitioner's attorney the opinion he now has as to the petitioner's state of mind at the time of the alleged criminal act.

The fact situation in this case is thus very close to the fact situation found in Blocker v. United States, 274 F.2d 572 (D.C. Cir. 1959). In Blocker

the defendant raised the defense of insanity at his trial. At that trial several psychiatrists from a mental hospital in the area testified that the defendant had a socio-pathic personality, but that this condition was not a mental disease. One month following the trial the assistant supervisor of the hospital where the psychiatrists who had earlier testified at the defendant's trial worked, testified in another action that he and the supervisor of the hospital now agreed that a person who had a socio-pathic personality suffered from a mental disease. The defendant therefore moved for a new trial on this newly discovered evidence. The Court ordered that in such a situation a new trial must be granted to give the defendant the benefit of this change in opinion by medical experts. The defendant's position is also supported by the holding in Franco v. State, 98 Neb. 746, 154 S.W. 236. In Franco the Nebraska Supreme Court held that where a medical examination given after the defendant's trial showed that the defendant was insane when he committed the crime, a new trial must be granted in order to allow the defendant to present this defense to a jury. Likewise, in Schmidt v. State, ____ Ind. ____, 307 N.E.2d 484 (1974) the Indiana Court of Appeals held that the testimony of two psychiatrists at a post trial sentencing hearing to determine if the defendant was a criminal

sexual deviate created reasonable grounds to order a separate hearing to determine the defendant's sanity at the time of trial and set aside the judgment sentencing the defendant to from two to twenty-one years in prison. In Schmidt the testimony of the psychiatrists indicated that following the trial they found that the defendant was legally insane. The Court held that this raised reasonable grounds to justify a hearing as to whether he was legally insane at the time of trial. This defense had not been raised at Schmidt's trial for rape. The Court set aside the judgment sentencing the defendant so that this hearing could be held to present this defense on the defendant's behalf.

In North Carolina testimony as to an opinion concerning a person's mental condition is not limited to medical experts and, therefore, the petitioner in the present case should have been given the opportunity, as were the defendants in Blocker, Franco and Schmidt, to present the newly discovered opinion evidence concerning the petitioner's defense of insanity.[1]

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[1] At a new trial on this matter the trial Court's instructions would have to be changed to conform to this Court's decision in Mullaney v. Wilbur, 43 U.S.L.W.

At his original trial the only person the petitioner had to testify that the petitioner did not know the nature and quality of his acts on the date of the alleged assault was the petitioner's wife.[2] Clearly her

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4695 (June 9, 1975). At the petitioner's original trial the jury was instructed "That every person is presumed to be sane until the contrary is made to appear" and that "the defendant has the burden of proving that he was insane. However, unlike the State which must prove the defendant's guilt beyond a reasonable doubt, the defendant need only to prove his insanity to simple satisfaction." In Mullaney v. Wilbur, supra, this Court spoke about the presumption of sanity in a criminal case and indicated that though it might be permissible "to require the defendant to present some evidence contesting the otherwise presumed or inferred fact. . . the ultimate burden of persuasion by proof beyond a reasonable doubt remains on the prosecution." Mullaney v. Wilbur, 43 U.S.L.W. 4695, 4701 n. 31 (June 9, 1975) (emphasis added).

[2] There was testimony from two doctors concerning the petitioner's mental condition which had required his hospitalization shortly before this alleged assault.

interest and bias in the case made her testimony very weak in the eyes of the jury. However, the newly discovered evidence comes from the lips of a former deputy sheriff, Mr. Richard Edwards, the person whose life was threatened and towards whom the defendant allegedly pointed the shotgun. It is clear that the effect on the jury of having the State's primary witness, the person whose life was threatened, now testify that he does not believe that the defendant knew right from wrong on the day in question will be substantial. It is thus probable that a different result will occur if the defendant is granted a new trial.

To refuse to allow the above testimony to be presented to a jury denies the petitioner due process of law since it prohibits him from presenting all of the relevant evidence in his favor to the jury deciding his guilt or innocence.

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[2] These physicians also testified as to the medication the petitioner was taking on the day of the alleged assault and the possible side effects of that medication. However, these physicians could not testify as to the petitioner's actions and mental condition on the day of the alleged assault since they did not see the petitioner on that day.

This Court has recently reaffirmed the importance of a "full disclosure of all [relevant] facts" at a trial of a case. United States v. Nobles, 43 U.S.L.W. 4815 (June 23, 1975). The petitioner has now discovered evidence crucial to his defense of insanity; evidence which was not available at his trial and which if presented to a jury at a new trial would probably result in a different verdict being rendered. Due process and the desire for substantial justice requires that when an accused discovers evidence of this type following the trial of his case he be allowed an opportunity to present this evidence to a jury as a part of his defense to the charges against him. As this Court has often held, the aim of the judicial system is to insure "that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88 (1935). This is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In Re Winship, 397 U.S. 358, 372 (1970) (Harlan J., concurring). These policies govern and apply with equal force when an accused moves for a new trial on the basis of newly discovered evidence. As stated by the Supreme Court of Virginia in Johnson v. Commonwealth, 126 Va. 775, 101 S.E. 341, 343 (1919):

> The object and aim of all

litigation is the attainment of substantial justice, and where, in the light of the after-discovered evidence, grave doubt is entertained as to the correctness of the verdict, and it seems probable that if the newly discovered evidence had been before the jury a different verdict would have been reached on the merits, the verdict should be set aside. While it is desirable that there should be an end to litigation with as little delay and expense as possible, this object is subordinate to the great end of litigation, to-wit, a correct decision of the cause on its merits.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX TO PETITION

No. 7413SC1036 THIRTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Spring Session 1975

STATE OF NORTH CAROLINA

v. From Brunswick

ELWOOD HAMMOCK

This is an appeal from an order denying defendant's motion for a new trial on the grounds of newly discovered evidence.

The defendant was charged, tried, convicted, and sentenced in the Superior Court of Brunswick County with feloniously assaulting Richard W. Edwards, a law enforcement officer (Deputy Sheriff) in violation of G.S. §14-34.2. On appeal, this court in a decision reported in 22 N.C. App. 439, 206 S.E.2d 773 (1974) found no error in the defendant's trial. In 285 N.C. 665, 207 S.E.2d 759 (1974), the Supreme Court denied the defendant's petition for writ of certiorari.

After reviewing the record of defendant's trial and the evidence offered at the hearing, the trial court denied the motion and the defendant appealed.

Atty. General Rufus L. Edmisten by Assistant Attorney General Keith L. Jarvis and Associate Attorney James Wallace, Jr., Raleigh, for the State.

Smith, Carrington, Patterson, Follin & Curtis by J. David James, Greensboro, and Murchison, Fox & Newton by Carter T. Lambeth, Southport for defendant-appellant.

HEDRICK, Judge. Defendant contends Judge Canaday abused his discretion and erred as a matter of law in denying his motion for a new trial on the grounds of newly discovered evidence. Appeal does not lie from a refusal to grant a new trial for newly discovered evidence. State v. Shelton, 21 N.C. App. 662, 205 S.E.2d 316 (1974); State v. Gordon, 15 N.C. App. 241, 189 S.E.2d 550 (1972); State v. Thomas, 227 N.C. 71, 40 S.E.2d 412 (1946); State v. Ferrell, 206 N.C. 738, 175 S.E. 91 (1934). We have, however, treated defendant's appeal as a petition for writ of certiorari, which is allowed.

G.S. 15-174 reads as follows:

> "The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases."

G.S. §1A-1, Rule 59(a), in pertinent part reads:

> "A new trial may be granted to all or any of the parties and on all or part of the issues of the following causes or grounds:
>
> * * * * * * * * * * * * * * * * * *
>
> (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;"

A motion for a new trial on the grounds of newly discovered evidence is addressed to the sound discretion of the trial court and is not subject to review absent a showing of an abuse of discretion. State v. Shelton, supra. The record discloses that at his trial the defendant offered evidence tending to show that he was insane and did not know the difference between right and wrong at the time of the alleged assault upon Deputy Sheriff Edwards. At the hearing on the motion, Edwards, testified he did not know the defendant well enough to form an opinion as to his mental condition at the time of the assault but that after the trial he has become better acquainted

with the defendant and that he is presently of the opinion that the defendant did not know "the nature and quality of his act" and that he (defendant) was "messed up" when he pulled the gun on him. Defendant now contends as he did in the Superior Court that the ability of the prosecuting witness now to testify that in his opinion the defendant was insane and did not know the difference between right and wrong at the time of the alleged assault constitutes newly discovered evidence entitling him to a new trial. Suffice it to say, we have reviewed the entire record and hold that the defendant has not shown any abuse of discretion in the trial court's denial of his motion for a new trial.

Affirmed.

PARKER and CLARK, JJ., concur.

Order filed March 5, 1975.

No. 7413SC1036 THIRTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Session 1975

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STATE OF NORTH CAROLINA

v. From Brunswick

ELWOOD HAMMOCK

****

Murchison, Fox & Newton, for defendant.

Rufus L. Edmisten, Attorney General, James Wallace, Jr., Associate Attorney, for the State.

Petition by defendant for writ of certiorari to review the decision of the Court of Appeals, 25 N.C. App. 97, 212 S.E.2d 180. Denied.